United Nations A/CN.4/678

General Assembly

Distr.: General
21 January 2015

Original: English

**International Law Commission**
**Sixty-seventh session**
Geneva, 4 May-5 June and 6 July-7 August 2015

# Report of the International Law Commission on the work of its sixty-sixth session

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session, prepared by the Secretariat

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# I. Introduction

1. At its sixty-ninth session, the General Assembly, on the recommendation of the General Committee, decided at its 2nd plenary meeting, on 19 September 2014, to include in its agenda the item entitled "Report of the International Law Commission on the work of its sixty-sixth session" and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 19th to 27th and 29th meetings, on 27, 28, 29 and 31 October and on 3, 5 and 14 November 2014. The Committee considered the item in three parts. The Chair of the International Law Commission at its sixty-sixth session introduced the report of the Commission on the work of that session (A/69/10) as follows: chapters I to V and XIV at the 19th meeting, on 27 October, chapters VI to IX at the 21st meeting, on 29 October, and chapters X to XIII at the 25th meeting, on 3 November.

3. At its 29th meeting, on 14 November 2014, the Sixth Committee adopted draft resolution A/C.6/69/L.14, entitled "Report of the International Law Commission on the work of its sixty-sixth session", and draft resolution A/C.6/69/L.15, entitled "Expulsion of aliens". The two draft resolutions were adopted by the Assembly at its 68th plenary meeting, on 10 December 2014, as resolutions 69/118 and 69/119, respectively.

4. The present topical summary has been prepared pursuant to paragraph 36 of resolution 69/118, by which the Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the report of the Commission at the sixty-ninth session of the Assembly. It consists of two parts. The first part contains nine sections, reflecting items on the current programme of work of the Commission: A. Protection of persons in the event of disasters (A/69/10, chap. V); B. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (chap. VII); C. Protection of the atmosphere (chap. VIII); D. Immunity of State officials from foreign criminal jurisdiction (chap. IX); E. Identification of customary international law (chap. X); F. Protection of the environment in relation to armed conflicts (chap. XI); G. Provisional application of treaties (chap. XII); H. Most-favoured-nation clause (chap. XIII); and I. Other decisions and conclusions of the Commission (chap. XIV). (The Commission completed the first reading of the topic "Protection of persons in the event of disasters" at its sixty-sixth session and will resume its consideration of the item at its sixty-eighth session, in 2016.) The second part contains two sections, on topics concerning which the Commission completed work at its sixty-sixth session: A. Expulsion of aliens (A/69/10, chap. IV); and B. Obligation to extradite or prosecute (*aut dedere aut judicare*) (chap. VI).

# II. Items on the current programme of work of the Commission

## A. Protection of persons in the event of disasters

### 1. General comments

5. Delegations welcomed the adoption, on the first reading, of the draft articles on the protection of persons in the event of disasters. Appreciation was expressed to

the Commission for managing to strike a balance between the need to safeguard the national sovereignty of the affected States on the one hand, and the need for international cooperation regarding the protection of persons in the event of disasters, on the other. Several delegations also expressed support for the focus on persons in need, within the context of a rights-based approach, as well as for the inclusion of references to preventive measures.

6. Some delegations were of the view that the rules formulated in the draft articles could not be regarded to reflect customary international law; rather they constituted progressive development of international law.

7. Several delegations reiterated their concerns, expressed previously, that the draft articles should not be cast in terms of rights and duties but rather in terms of guiding international voluntary cooperation efforts. At the same time, the proposal was made that the Commission consider incorporating a stronger rights-and-duties approach between the affected State and its population by, for example, strongly encouraging affected States to enter into national, multilateral, regional and bilateral agreements that would ensure that, in the event a State was unable to provide adequate protection owing to lack of resources, other States parties to the agreement would have a duty to assist the affected State.

### 2. Specific comments on the draft articles adopted on first reading

8. A comment was made expressing support for the clarification in paragraph (3) of the commentary to draft article 1 [1], Scope, that the scope *ratione personae* of the draft articles was limited to natural persons affected by disasters. With regard to the scope *ratione loci*, it was suggested that a provision covering transit states be included. The Commission was also requested to provide an explanation of the term "society" as used in the phrase, "serious disruption of the functioning of society".

9. Some delegations expressed a preference for merging draft article, 3 [3], Definition of disaster, with draft article 4 on the use of terms. Concerning draft article 4, support was expressed by some delegations for the definition of the term "affected State" in paragraph (a) and the inclusion of situations of *de facto* control exercised by a State over a territory other than its own. On paragraph (b), "assisting State", agreement was expressed by some delegations with the view that a State can be qualified as an "assisting State" once the assistance is being or has been provided. The view was expressed that the qualifier "at its request or with its consent" was unnecessary since such conditions apply as a result of the substantive provisions of the draft articles and need not be repeated. Concerning paragraph (c), "other assisting actor", it was noted by several delegations that the concept of "assisting actors", in the draft articles, related not only to States but also to competent intergovernmental and non-governmental organizations, and other entities such as the Red Cross and the Red Crescent. It was further proposed that the respective commentary also include a specific reference to regional integration organizations. In terms of another view, the interaction of the definition with other draft articles raised some doubts, since other entities or individuals which were included in the definition were not being consistently referred to in the draft articles dealing with the rights and obligations of assisting actors. With regard to paragraph (d), "external assistance", a comment was made expressing support for the view that domestic actors who offer disaster relief assistance or disaster risk reduction were outside the scope of application of the draft articles. In relation to paragraph

(e),"relief personnel", it was proposed that the definition, to the extent that it also covers military personnel, be aligned with the Guidelines on the Use of Foreign Military and Civil Defence Assets in Disaster Relief of November 2007 and the Guidelines on the Use of Military and Civil Defence Assets to Support United Nations Humanitarian Activities in Complex Emergencies, so as to specify that international military assets should be used as a last resort, when civilian alternatives are exhausted. It was also suggested that it be clarified that, irrespective of the operational control of the affected State, military personnel remain under the command of the assisting State, and that such relief operations remain attributable to the assisting State. A concern was expressed about the inclusion of military personnel within the scope of "relief personnel", as their presence could be interpreted as an encroachment on the sovereignty of the affected State. In terms of another view, such form of external assistance could only be provided on the basis of prior express and informed agreement or consent of the affected State. The point was also made encouraging the Commission to draw a greater distinction between persons sent to provide humanitarian relief and those sent to assist in the field of disaster risk reduction. On paragraph (f), "equipment and goods", the view was expressed that the provision of "external assistance" in the form of "equipment and goods" by assisting States or entities could only be done on the basis of prior express and informed agreement or consent of the affected State.

10. While general support existed for draft article 5 [7],Human dignity, it was observed that it was not clear who should act in accordance with the principle in question. The view was expressed that all persons who take part in disaster relief operations must act in accordance with the principle, and not only the assisting State, competent international organizations and relevant non-governmental organizations. The point was made that the purpose of draft article 6 [8], Human rights, was not clear. A clarification was requested as to whether any human rights could be limited owing to an emergency situation and, if so, which rights and under what circumstances. It was suggested that the practice of the Human Rights Committee, international judicial institutions and national courts would be of relevance. In terms of a further suggestion, reference could be added to the need to also protect the interests of the affected community as a whole. While general support was expressed for draft article 7 [6], Humanitarian principles, it was also suggested that it be supplemented by a reference to the principle of non-interference in the domestic affairs of a State by other States and international organizations that participate in the provision of assistance. It was also suggested that the principles in question should be observed in parallel with the principles of respect for the sovereignty and territorial integrity of the affected State, as well as its national unity.

11. The view was expressed that draft article 8 [5], Duty to cooperate, required substantial changes. In particular, the basis on which an obligation was imposed on States to cooperate with international organizations, non-governmental organizations and the International Committee of the Red Cross in the same manner as among themselves, was considered unclear. A preference was expressed for the inclusion of a corresponding duty to cooperate with the State affected by a disaster. It was also suggested that the provision expressly indicate the right of the affected State to choose the assistance it wishes to accept, and that the duty to cooperate should be understood in the context of the affected State retaining the primary responsibility for protection of persons in the event of disasters. In terms of another

view, concurrence was expressed for the inclusion of the qualifier "as appropriate" on the understanding that it was not intended to go beyond the duty to cooperate as established in customary international law. The view was expressed that, given its descriptive character, draft article 9 [5 bis], Forms of cooperation, could not be regarded as being legally binding. It was suggested that it be clarified that the forms of assistance offered to the affected State should be based on its request. It was also proposed that the language be drafted in more contingent non-exhaustive terms so as to read "could include" as opposed to "includes".

12. The view was expressed that no general obligation to reduce the risk of disasters, as contained in draft article 11 [16], Duty to reduce the risk of disasters, existed under international law, regardless of the individual and multilateral measures taken by States to reduce such risk. It was suggested that the provision be reformulated as a recommendation, subject to the qualifier "within their ability".

13. On draft article 12 [9], Role of the affected State, it was suggested that the Commission reconsider the use of the phrase "to ensure the protection", which might not be possible and would (unreasonably) imply that a failure of the State to protect — in the midst of a national disaster — might amount to a breach of international law. It was suggested that the phrase be replaced with "to adopt all necessary measures to provide assistance". Several delegations took the position that States and entities supporting disaster recovery in affected States should coordinate disaster recovery and relief operations directly with the affected States rather than through international non-governmental organizations. While several delegations expressed support for the duty of the affected State to seek external assistance if its national response capacity was not sufficient to cope with a disaster, as reflected in draft article 13 [10], Duty of the affected State to seek external assistance, other delegations expressed reservations. It was pointed out that it was not clear who would be authorized to determine whether a disaster had occurred and whether the affected State was in compliance with the obligation to request assistance, or whether the response necessitated by the disaster exceeded the national capacity of the affected State. Support was expressed by some delegations for the view that the affected State had the right to determine, within its discretion, whether or not its internal capacity was sufficient to protect persons falling within its jurisdiction and control in the event of a disaster, and that it should not be obliged or compelled to seek external assistance but rather had the right to seek such assistance if it so required. In terms of a further view, the obligation to seek external assistance did not enjoy a legal basis in State practice. Although it was noted that the Commission had employed the term "duty", as opposed to "obligation", to accommodate the concerns of States, the legal connotations of the word "duty" remained unclear. It was proposed that the draft article be reformulated as a recommendation. Several delegations expressed support for draft article 14 [11], Consent of the affected State to external assistance, as a whole. Support was also expressed for the inclusion of the requirement of "consent" in paragraph 1 so as to confirm the basic rule that the affected State's unequivocal consent must be a prerequisite to any form of external assistance. While support was expressed for paragraph 2, other delegations expressed doubts. It was recalled that each State retains the right to withhold consent to the entry of other States or organizations on its territory or may decline to accept assistance from other States or organizations. The difficulty with paragraph 2 lay in the fact that it did not state whether the standard of arbitrariness was to be assessed objectively or subjectively. Moreover, it

failed to specify who would decide that consent was being withheld arbitrarily in the face of manifest need. In terms of another suggestion, reference could also be made in paragraph 2 to withdrawal of consent, such that consent to external assistance should not be withheld or withdrawn arbitrarily. With regard to paragraph 3, an explanation of the legal consequences of an affected State being unable to take a decision was called for.

14. The view was expressed in support of draft article 15 [13], Conditions on the provision of external assistance, as well as the assertion in paragraph (8) of the corresponding commentary calling for a process by which needs are made known, which could take the form of a needs assessment, preferably in consultation with assisting actors. Regarding draft article 16 [12], Offers of external assistance, the concern was expressed about the "right" of States and the United Nations and other competent intergovernmental organizations to offer assistance to the affected State, notwithstanding the explanation in the commentary that the draft article was only concerned with "offers" of assistance, not with the actual "provision" thereof, and that an offer of assistance did not create for the affected State a corresponding obligation to accept it. Suggestions included replacing the term "right" with "capacity" or "freedom", or simply deleting the draft provision altogether. Support was expressed for draft article 17 [14], Facilitation of external assistance. The importance of the granting of special legal status to international relief personnel in facilitating their rescue and support operations was recognized. As a consequence of the amendments proposed for the definition of "relief personnel", in draft article 4, subparagraph (e), it was proposed that the phrase "civil and military" be replaced by "relief personnel".

15. Draft article 18, Protection of relief personnel, equipment and goods, was generally welcomed by several delegations. Support was also expressed for the formulation of the obligation on the affected State as being "to take appropriate measures", which was generally understood as constituting an obligation of conduct rather than one of result. It was also suggested that the further qualifier "subject to the available resources and capabilities" be added to the draft provision.

16. Concerning draft article 19 [15], Termination of external assistance, support was expressed by some delegations for the position, expressed in paragraph (5) of the corresponding commentary, that decisions regarding the termination of assistance were to be made taking into consideration the needs of the persons affected, namely, whether and how far such needs had been met.

17. Draft article 20, Relationship to special or other rules of international law, was welcomed by some delegations. With regard to the application of *lex specialis*, the view was expressed that, notwithstanding the degree of specificity of any treaty regime, the provisions of the draft articles retained an added value and should remain applicable, filling relevant legal gaps, even in cases of detailed treaty regimes already in place. As such, it was proposed that the provision be redrafted as a "notwithstanding" clause, as opposed to using a "without prejudice" formulation. It was suggested that the commentary provide further illustration of the "other rules of international law" envisaged in the draft article. Support was also expressed by some delegations for the decision not to include a specific provision on the relationship to the Charter of the United Nations. In terms of another view, such a provision would have been useful in highlighting the cardinal role played by the principles enshrined in the Charter, in particular the principles of sovereignty and

territorial integrity in relation to the affected State. In terms of another suggestion, express reference could have been made to the status of regional agreements and mechanisms for disaster cooperation.

18. On draft article 21 [4], Relationship to international humanitarian law, which excluded the applicability of the draft articles to armed conflicts, the view was expressed that there existed a lack of concordance between the text of the draft article and its commentary, which indicated that the draft articles could, in fact, be applicable to such situations to the extent that they were not covered by international humanitarian law, and the text of draft article 1, defining "disaster". Support was expressed for an approach according to which the two sets of provisions would apply in parallel, where appropriate. Draft article 21 [4] could be expressed as a "without prejudice" clause, so that the draft articles would remain applicable in "complex situations" of both armed conflict and disasters.

### 3. Final form of the draft articles

19. While some delegations reserved their respective positions as to the final form of the draft articles, other delegations expressed a preference for a set of guiding principles as opposed to a binding instrument. In terms of another view, adoption in the form of guidelines was not advisable, noting that this could hamper progress in, the implementation of existing guidelines, in particular the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance, of the International Federation of Red Cross and Red Crescent Societies, as previously negotiated and adopted by the State parties to the Geneva Conventions. Instead, it was observed that strengthening the global legal framework would add a new element with the potential to further stimulate and enhance the work that had been accomplished through soft instruments.

## B. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

### 1. General comments

20. Delegations generally emphasized the importance and usefulness of the topic in providing guidance to practitioners dealing with the interpretation and application of treaties. The adoption of the five draft conclusions at the sixty-sixth session by the Commission, which were considered balanced and in line with the overall objective of the work on the topic, was generally welcomed. A view was expressed that the draft conclusions should be more precise and given a greater normative content. The distinction made in the draft conclusions between article 31, paragraph 3, and article 32 of the Vienna Convention on the Law of Treaties was considered well founded by some delegations, although it was suggested to distinguish more clearly the conclusions relating to those two articles.

### 2. Specific comments

21. Several delegations supported the formulation of draft conclusion 6, Identification of subsequent agreements and subsequent practice, and in particular, the specific conclusion that the identification of subsequent agreements and subsequent practice requires a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. The

distinction made between interpretation and application of a treaty was welcomed by some delegations, although a view was expressed that they could be more clearly distinguished. The suggestion was made that the application of a treaty did not necessarily involve its interpretation.

22. Draft conclusion 7, Possible effects of subsequent agreements and subsequent practice in interpretation, was supported by a number of delegations. Several delegations emphasized the importance of not contradicting the intention of the parties, as expressed in the wording of the treaty itself, and considered that subsequent practice as a means of interpretation should be applied with caution. Delegations generally supported the conclusion that it is presumed that the parties to a treaty, by a subsequent agreement or practice, intend to interpret a treaty and not to amend or to modify it. A number of delegations also agreed with the conclusion that the possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized, although some others considered that such an effect could not be generally excluded. It was suggested that the distinction between the rules pertaining to the interpretation of treaties and those relating to their modification be clarified.

23. Some delegations expressed their general agreement with draft conclusion 8, Weight of subsequent agreements and subsequent practice as a means of interpretation. A number of delegations supported the conclusion that the weight of a subsequent agreement or subsequent practice as a means of interpretation depends on its clarity and specificity. The view was expressed that the consistency and repetition of practice were necessary for this practice to be relevant in the interpretation process.

24. Several delegations expressed their agreement with draft conclusion 9, Agreement of the parties regarding the interpretation of a treaty. Some delegations supported the conclusion that an agreement under article 31, paragraph 3 (a) and (b), of the Vienna Convention on the Law of Treaties required the awareness and acceptance of the parties. One view was expressed concurring in the assertion that such an agreement need not be legally binding, while another view questioned that conclusion. Some delegations stressed that the subsequent practice of fewer than all parties to a treaty, and in particular, silence on the part of some parties, could serve as a means of interpretation solely under very restrictive conditions. Certain delegations suggested that the conditions under which silence on the part of one or more parties could constitute acceptance of the subsequent practice be clarified.

25. Draft conclusion 10, Decisions adopted within the framework of a Conference of States Parties, was supported by a number of delegations, although it was suggested that it related only to an exceptional situation. The conclusion that the adoption of a decision by consensus should not automatically be equated with an agreement in substance was also supported. A view was expressed that the authority of an agreement in substance between the parties regarding the interpretation of a treaty depended on the form and procedure by which the decision had been adopted.

### 3. Future work

26. Some delegations welcomed the Special Rapporteur's intention to address subsequent agreements and subsequent practice in relation to constituent treaties of international organizations. The attention of the Commission was drawn to the consequences of the fact that the topic was concerned with subsequent agreements

and subsequent practice as they relate to the rules set forth in the 1969 Vienna Convention on the Law of Treaties and not the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

## C. Protection of the atmosphere

### 1. General comments

27. Some delegations welcomed the inclusion of the topic in the Commission's programme of work, noting in particular that international environmental law had become an increasingly important subject and that there was no legal framework that covered the entire range of atmospheric environmental problems in a comprehensive and systematic manner. It was acknowledged that the protection of the atmosphere was one of the most pressing challenges facing humankind, since the atmosphere was not only indispensable to life on earth but also posed multifaceted challenges, giving rise to responsibilities for all. The hope was expressed that the Commission's work on the topic, presented from the perspective of general international law, would not only raise the visibility of international environmental law, but also counteract fragmentation. To achieve that end, the suggestion was made that the general orientation and direction of the topic ought to be made clearer.

28. In that connection, some delegations commented that, considering the reluctance among States to having an all-encompassing regime, such an effort could seek to identify the rights and obligations of States that could be derived from existing legal principles and rules applicable to the protection of the atmosphere. It was also pointed out that the Commission could contribute in identifying common principles in existing treaties and practice for the protection of the atmosphere. For some other delegations, the Commission could glean core rules and principles that would be useful in crafting a unified regime.

29. It was also suggested that the overall goal could be to identify existing or emerging rules of international law, without developing new ones, as well as gaps in current regimes, without seeking to fill them. In that regard, it was proposed that the Commission consider precaution, sustainability and international cooperation, including difficulties related to capital, technology and capacity-building. It would also be necessary to address the substance of State responsibility in the light of the increasing risk of natural disasters, especially in relation to action that States could take to mitigate the effects of climate change. Some other delegations did not preclude the possibility of proposals aimed at filling gaps.

30. Some delegations continued to express doubts regarding the Commission undertaking work on this topic, given: (a) the challenges associated with identifying what contribution the Commission could make; (b) the ongoing political negotiations on climate change and related issues; (c) the highly technical nature of the subject; and (d) the lack of international consensus on a legal expression of the concern over the environment. It was affirmed that the suitability concerns expressed previously had been borne out by the first report of the Special Rapporteur (A/CN.4/667). Since various long-standing treaty regimes already provided not only general guidance to States in their development, refinement and implementation, but also often contained specific guidance tailored to discrete

problems relating to atmospheric protection, there was not much else that the Commission could address.

31. Some delegations recalled the difficulties that had been envisaged in pursuing the topic, given that many of the relevant issues were governed to a large extent by existing international legal instruments, which were the product of difficult compromises. Accordingly, in order not to upset the balance achieved, the Commission was encouraged to proceed cautiously, without seeking to reinvent the wheel, to downplay existing treaty mechanisms or distort existing principles or to serve as substitute for specific decisions and action to be taken at the political level.

32. Delegations also alluded to the importance of proceeding with due regard to the understanding reached in 2013 when the topic was included in the programme of work of the Commission. While some delegations doubted whether it had been fully adhered to thus far, others noted that it had been followed in the preparation of the report by the Special Rapporteur, while still others viewed it as constraining the Special Rapporteur. Going forward, it was noted that the understanding should be sufficient to allow the work to proceed constructively, in awareness of the constraints deriving from negotiations in other forums. Some delegations urged the Special Rapporteur to adhere strictly to the letter and spirit of the understanding in order for the Commission to realize an outcome that would be of value to States, while others appealed for flexibility in the appreciation of the understanding. In its development of the guidelines, the Commission was encouraged to base its work on State practice and to avoid taking a narrow perspective that relied on non-binding instruments.

33. In terms of focus, some delegations agreed with the suggested attention to air pollution, ozone depletion and climate change.

### 2. Specific comments

34. With regard to the "Use of terms", the point was made that it was crucial, when defining the "atmosphere", to maintain the distinction between the atmosphere and airspace. It was questioned how a definition of the atmosphere could exclude the mesosphere and thermosphere, which also formed part of the atmosphere. The suggestion was made that the unique physical characteristics of the atmosphere, namely the movement and circulation through atmospheric circulation, should be incorporated in any definition.

35. Concerning the "Scope of the guidelines", it was suggested that the specific types of human activities to be covered should be elucidated in order to avoid overlap with the activities covered under the existing regimes. It was also noted, bearing in mind the 2013 understanding, that the various terms used might need further clarification. On the other hand, the point was made that reference to basic principles of international environmental law would be inevitable.

36. On the "Legal status of the atmosphere", the suggestion was made that the rights and obligations of States in relation to the protection of the atmosphere should first be determined before defining its legal status. The qualification of the atmosphere as a natural resource whose protection was a "common concern of humankind" still left open the question of which particular obligations could be derived therefrom. Some delegations were opposed to the use of the concept of a "common concern of humankind" within the framework of the topic. It was

considered that the concept was vague and controversial, its content was not only difficult to define but also variously interpreted. Some other delegations, however, agreed with the Special Rapporteur that the protection of the atmosphere was a common concern of humankind, noting further by way of clarification that what was "the common concern of humankind" was not the protection of the atmosphere, but its deteriorating condition. It was suggested that such an affirmation would not necessarily entail substantive legal norms that directly set out legal relationships among States, but would rather acknowledge that the protection of the atmosphere was not an exclusively domestic matter. Even though some delegations had no objections, in principle, to this qualification, they suggested that it required further consideration by the Commission in its subsequent work, including its relationship with other environmental principles and concepts. The possibility of according the atmosphere the same legal treatment as the high seas was cautioned against, as the atmosphere was perceived to be different in essence and nature. It was stressed by some delegations that from a legal perspective, the topic required an integrated approach that treated the atmosphere as a single global unit, since it was a dynamic and fluid substance moving constantly across national boundaries.

## D. Immunity of State officials from foreign criminal jurisdiction

### 1. General comments

37. Delegations welcomed the progress the Commission had made on the topic to date. It was acknowledged that the topic was not only of relevance and genuine practical significance but also complex. Accordingly, it was considered crucial that the Commission, in developing the topic, be cautious and pay due regard to State and judicial practice concerning immunity, even though the paucity of such practice in respect of criminal matters was recognized. A clear, accurate and well-documented statement of the law by the Commission, reflecting a high degree of consensus of States, was viewed as desirable.

38. While the analytical approach that drew systematic distinctions between criminal and civil jurisdiction, immunities *ratione personae* and *ratione materiae* and rules of immunity and criminal jurisdiction was commended, the point was made that it was important that the Commission ensure that its outcome did not lead to fragmentation of international law or to the alteration of existing immunity regimes. Attention was also drawn to the need further clarify the meaning of the expression "from the exercise of foreign criminal jurisdiction", in particular in relation to the criminal jurisdiction exercised by administrative authorities and its instantiation, especially whether immunity covered measures to ascertain the facts of a case. Moreover, additional clarifications were required on the exercise of criminal jurisdiction in the context of relations of a State with international courts and tribunals, in particular with respect to acts of judicial authorities on the basis of an arrest warrant issued by an international criminal tribunal. The Commission was also urged, at the appropriate time, to deal comprehensively with the issue of immunity of military forces of the State.

### 2. Specific comments

39. With respect to draft article 2 (e), "State official", some delegations considered that it was better to retain the term "State official" than to use "State organ", despite

recognizing the ambiguity occasioned in its French version (*représentant de l'Etat*) or its Spanish version (*funcionario del Estado*). A comment was also made reiterating a preference for "representative of the State acting in that capacity" to the term "State official".

40. While the point was made that it was unnecessary to define "State official" for the purposes of the draft articles, some delegations viewed the need for such a definition and the definition proposed favourably, stressing the importance of coherence and noting that the restriction to natural persons, as opposed to legal persons, was entirely appropriate.

41. Some delegations welcomed the fact that the definition covered beneficiaries of both immunity *ratione personae* and immunity *ratione materiae*. Several delegations supported the representative and functional approaches taken by the Commission in identifying criteria relevant for defining "State official" for purposes of immunity. The point was made that such an effort could be useful in revisiting, as a matter of progressive development, the question of expanding the number of beneficiaries of immunity *ratione personae* beyond the *troika* without necessarily developing a list, a matter which was problematic and impractical. Several delegations emphasized the importance of dealing with each situation on a case-by-case basis, and the decisive nature of the link of an official to the State, with some noting that the conduct should be directly linked to the exercise of State sovereignty. The point was nevertheless made that there might be a need for greater clarity with regard to the specific link between the individual and the State.

42. With regard to the scope of the definition, for some delegations, the effect of the text should be to cover all acts performed by State officials in an official capacity. In terms of another view, the proposed definition needed further explanation. It was, for instance, suggested that the terms "represents the State" and "State functions" might need to be further defined, as the scope was not exactly clear. The question was asked whether personnel contractually mandated by a State to exercise certain functions would fall under the definition of "State official" and whether the term covered teachers and professors in State-run institutions of learning. Moreover, even though the commentary stated that "State functions" should be construed broadly, it was not exactly clear what the term meant, including whether domestic law or international law or both governed the determination of such functions. Nor was it apparent whether there was intended to be a distinction between "State functions" and "governmental authority", as used in article 5 of the articles on the responsibility of States for internationally wrongful acts. Accordingly, the suggestion was made that the nature of the acts concerning which immunity was invoked would require definition in further work concerning the topic. In addition, it was noted that the question of the definition should be revisited once work on the topic had advanced.

43. Several delegations supported draft article 5, Immunity *ratione materiae*, as it corresponded to draft article 3 on immunity *ratione personae*, provisionally adopted in 2013. It was noted that the material scope of immunity *ratione materiae*, which was a key aspect of the topic to be taken up at a later stage, was not prejudged.

44. For some delegations, the formulation of the draft article was imprecise and needed improvement. The suggestion was made to clarify further the meaning of "State officials acting as such", in particular whether it covered *ultra vires* acts or acts contravening instructions. The point was also made that the Commission might

wish to develop the concept of "elements of governmental authority" in respect of the draft article, while according to another view the use of "State officials acting as such" was an improvement over the earlier reference to "State officials who exercise elements of governmental authority", which was considered as too narrow. In that connection, it was observed that "acting as such", in combination with the definition of "State official" in draft article 2 (e), for purposes of immunity *ratione materiae* could be understood to mean acts in which a State official either represented the State or exercised State functions. A suggestion was also made to use "acting in that capacity" to denote that an individual was acting in an official rather than a private capacity.

45. The point was made that it would be useful to examine the relationship between the present topic and rules on State responsibility in order to clarify the extent to which acts giving rise to responsibility for internationally wrongful acts would be covered by immunity *ratione materiae*. It was also considered a crucial challenge to define the kinds of acts with regard to which State officials acting as such would enjoy immunity *ratione materiae*. It was also noted that immunity *ratione materiae* of former State officials should be considered.

46. Concerning the question of possible exceptions to immunity, several delegations encouraged the Commission to analyse critically the available practice, taking into account landmark treaties and jurisprudence covering a long period of cases. It was also suggested that the Commission might wish to consider whether an update of the memorandum by the Secretariat (A/CN.4/596), which contained a study of State practice, would helpful.

47. On the possible exceptions to immunity *ratione personae*, the point was made that the current state of international law required a highly restrictive approach, and in particular that the present topic concerned immunity from national jurisdiction and therefore did not extend to prosecutions before the International Criminal Court or ad hoc tribunals. It was also noted that there should be no exceptions to the immunity of a Head of State as there was no support for such exceptions in the practice of States, except in the case of waiver.

48. On the possible exceptions to immunity *ratione materiae*, several delegations underscored, given the gradual developments in international criminal law, that no State official should be shielded by rules of immunity with respect to the most serious crimes that concerned the international community as a whole, as that would effectively lead to impunity. On that account, it would be difficult to contemplate that immunity *ratione materiae* could apply in the case of international crimes committed in the course of duty or to any act performed for personal benefit given the functional nature of such immunity. It was suggested that crimes such as genocide, crimes against humanity and serious war crimes should not be included in any definition of acts covered by immunity.

49. Some other delegations doubted that rules of customary international law relating to serious crimes had developed concerning the non-application of the immunity of State officials in respect of such crimes. The Commission was cautioned against any dangerous inclusion in customary law of exceptions to immunity. It was recalled that the procedural nature of immunity, which was emphasized, did not preclude the consideration of the substantive aspects of the matter and immunity should not be equated to impunity.

50. For some delegations, it was necessary that account be taken of relevant criminal law treaties, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or the International Convention for the Protection of All Persons from Enforced Disappearance, which provided for extraterritorial criminal jurisdiction. The point was also made that the Convention against Torture constituted *lex specialis* or an exception to the usual rule on immunity *ratione materiae* of a former Head of State because under the Convention's definition of torture it could be committed only by persons acting in an official capacity. Moreover, a plea of immunity *ratione materiae* would not operate in respect of certain criminal proceedings for acts of a State official committed on the territory of the forum State.

51. On the other hand, there was doubt regarding whether the application of universal jurisdiction or the obligation to extradite or prosecute had any effect on State officials who enjoyed immunity.

## E. Identification of customary international law

### 1. General comments

52. Delegations generally supported the preparation of a practical guide, in the form of a set of conclusions with commentaries, to assist practitioners in identifying rules of customary international law.

### 2. Specific comments

53. Delegations supported the two-element approach of the Commission to the identification of rules of customary international law, which requires taking into account both general practice and acceptance as law in the identification of rules of customary international law. Several delegations added that the view according to which, in some fields, one constituent element alone would be sufficient to establish a rule of customary international law was not supported by international practice and in the jurisprudence. Some delegations suggested exploring the variation of the respective weight of the two elements in specific fields of international law. The Special Rapporteur's proposal to further consider the relationship between the two elements was welcomed.

54. With respect to a general practice, support was expressed for the conclusion that the relevant practice must be sufficiently widespread and representative to establish a rule of customary international law, although, according to one view, practice should be extensive and virtually uniform to give rise to a customary rule. It was suggested that the identification of customary international law called for the study of the practice of States representing all major civilizations and legal systems of the world. A number of delegations added that, in some fields, the practice of "specially affected States" should be given due consideration, while some other delegations questioned this conclusion.

55. It was suggested that the standard for the determination of State practice should be whether an act was attributable or not to the State in question, but that *ultra vires* acts should, however, not serve as evidence of customary rules. According to another view, all the acts of a State should be taken into account. Several delegations questioned the reference to the rules of attribution as set out in

the articles on responsibility of States for internationally wrongful acts in the context of the identification of State practice, stressing that they served a different purpose.

56. Several delegations acknowledged that it was primarily the practice of States that was to be taken into account when identifying a rule of customary international law. A number of delegations also emphasized the importance of the practice of international organizations in the formation of customary rules, especially in instances where Member States had transferred competence to them. According to certain delegations, the practice of international organizations should be taken into account with caution, since their contribution to the formation of customary international law could not be equated to that of States. The view was expressed that the practice of non-State actors could also contribute to the formation of customary rules. Some other delegations indicated, however, that statements of non-State actors could not be considered as practice for the purpose of identifying customary international law.

57. Several delegations supported the conclusion that practice could take a variety of forms, including physical and verbal acts. While agreement was expressed with the conclusion that inaction could also serve as practice, it was suggested that the conditions under which this could be the case be further examined. Support was expressed for the conclusion that there was no predetermined hierarchy between the forms of practice, while some delegations stressed that the practice of certain State organs was nevertheless of greater importance for the formation of rules of customary international law. According to another view, conflicting statements by various State organs weakened the weight to be given to that practice.

58. With respect to acceptance as law (*opinio juris*), some delegations considered that States might follow a general practice on the assumption that a right was being exercised or an obligation was being complied with in accordance with international law. Support was expressed for the forms of evidence of acceptance as law listed in the second report of the Special Rapporteur (A/CN.4/672). Some delegations indicated that certain manifestations could demonstrate both State practice and acceptance as law, while, according to another view, the acceptance of a practice as compelled by law could not be proved merely by reference to the evidence of the practice itself. It was proposed that the Commission study the question of *opinio juris* over time, seeking to identify the point at which it could be said to exist regarding a certain practice.

### 3. Future work

59. A number of delegations welcomed the Special Rapporteur's proposal to consider the interrelationship between customary international law and other sources of international law, the question of the "persistent objector" and regional customary international law.

## F. Protection of the environment in relation to armed conflicts

### 1. General comments

60. While several delegations indicated the importance that they attached to the topic, some other delegations reiterated their concerns regarding its feasibility,

noting that it was difficult to delineate. It was also pointed out that the relationship between international environmental law and situations of armed conflict required further analysis.

### 2. Specific comments

61. With regard to methodology, a number of delegations welcomed the temporal approach adopted by the Special Rapporteur (before, during and after armed conflict, phases I, II and III, respectively), while agreeing that no strict dividing line should be drawn between those phases. Doubts were nevertheless reiterated concerning the feasibility of proceeding with a temporal methodology, and it was suggested that a thematic approach be considered. Whereas some delegations welcomed the confirmation by the Special Rapporteur that the focus of work remained on phases I and III, a number of delegations stressed the relevance of phase II. Concerning phase II, some delegations reiterated their view that the Commission should not attempt to modify the laws of armed conflict. In that regard, it was suggested that the Commission limit itself to assessing the provisions within the laws of armed conflict related to the protection of the environment without attempting to determine their customary international law status or to modify them. However, attention was also drawn to the imprecise nature of terms relating to environmental protection in the laws of armed conflict and it was suggested that those terms might require further clarification or enhancement. It was observed that the Commission should consider embarking on a progressive development exercise if the existing protection was deemed insufficient.

62. Noting the importance of clearly defining the scope of the topic, the cautious approach of the Special Rapporteur was welcomed and some delegations expressed support for her proposed limitations. However, the need for substantively limiting the topic was also questioned. Various views concerning the precise scope of the topic were nevertheless voiced, including on whether or not to consider issues relating to human rights, indigenous peoples, refugees, internally displaced persons, natural heritage protection, cultural heritage protection and the effect of weapons on the environment.

63. Concerning the environmental principles identified by the Special Rapporteur in the preliminary report (A/CN.4/663), while some delegations emphasized their relevance for the development of the topic, the appropriateness of considering some of those principles in the current context was also questioned. In that regard, attention was particularly drawn to the principle of sustainable development and the need for environmental impact assessment as part of military planning. With regard to the latter, however, the view was also expressed that an analysis of the issue would be welcome. On a more general level, concerns were also expressed over the manner in which some of the principles had been characterized in the preliminary report; the Commission was urged to consider them further in order to determine their applicability in the context of the topic.

64. While the need for elaborating definitions for the terms "environment" and "armed conflict" was questioned, the view was also expressed that the Commission should develop broad working definitions in order not to limit its consideration of the topic prematurely. A number of delegations also observed that the elaboration of use of terms required further consideration. Concerning the term "environment", it was noted that the definition adopted by the Commission in the principles on the

allocation of loss in the case of transboundary harm arising out of hazardous activities seemed an appropriate starting point. According to another view, the term needed to be defined with reference to its specific context. Regarding the term "armed conflict", some delegations stressed that the definition contained in international humanitarian law should be retained. Reference was also made to the definition used in the *Tadić* case[1] and subsequent jurisprudence, as well as to the definition contained in the Commission's work on effects of armed conflicts on treaties. Whereas the appropriateness of including in the scope of the topic situations of non-international armed conflict and conflict between organized armed groups or between such groups within a State was questioned by some delegations, other delegations considered that those situations should be addressed. Some delegations observed that situations of limited intensity of hostilities should fall within the scope of this topic.

### 3. Final form

65. A number of delegations favoured the elaboration of non-binding guidelines, or a handbook, rather than a draft convention. The point was also made that it was premature to take a stance on this issue.

## G. Provisional application of treaties

### 1. General comments

66. While the increasing importance of provisional application of treaties in the practice of States was acknowledged, some delegations observed that, in cases of lengthy ratification processes owing to constitutional requirements, provisional application could provide a suitable method of bringing a treaty into early effect. As such, it was described as being an instrument which granted States some flexibility in shaping their legal relations by accelerating the acceptance of international obligations. At the same time, it was noted that any analysis of the mechanism had to be coupled with an appreciation of the constitutional challenges that provisional application presented for many States. The view was expressed that the Commission's examination of the provisional application of treaties was critical and timely; it was in particular pointed out that when a validly concluded treaty actually applied and became binding on States was important. It was suggested that the Commission also consider the *travaux préparatoires* of the Vienna Convention on Succession of States in respect of Treaties, of 1978.

67. There was also general agreement expressed with the view that the task of the Commission was neither to encourage nor to discourage the provisional application of treaties, but rather to provide guidance so as to enhance understanding of the mechanism.

### 2. Specific comments

68. As regards the legal effects of provisional application, support was expressed for the position of the Commission that the rights and obligations of a State, which had decided to provisionally apply the treaty, or parts thereof, were the same as if

[1] See *Prosecutor* v. *Duško Tadić a/k/a "DULE"*, ICTY, Case No. IT-94-1-A72, Appeals Chamber, 2 October 1995 (available at www.icty.org/x/cases/tadic/acdec/en/51002.htm), para. 70.

the treaty were in force for that State. It was noted by some delegations that article 25 of the Vienna Convention on the Law of Treaties went beyond the general obligation not to defeat the object and purpose of the treaty prior to its entry into force. In terms of a further view, the exercise and discharge of the rights and obligations under the treaty could be limited either by the terms of the treaty being provisionally applied or by a separate agreement between the parties to the treaty. It was also observed that, in practice, the provisional application of certain provisions of treaties could be limited by the application of domestic law provisions requiring prior approval by the respective legislatures. In some situations, domestic law could prevent provisional application entirely. However, the view was expressed that the provisional application of a treaty could not lead to a modification of the rights and obligations themselves.

69. It was observed that the consequence of provisional application was that a breach of the applicable provisions of a treaty being provisionally applied constituted an internationally wrongful act that triggered the international responsibility of the State. Furthermore, in line with article 27 of the Vienna Convention, a State that validly opted to provisionally apply the treaty could not rely on its domestic law as an excuse to justify its failure to discharge its obligations under the treaty. According to some delegations, further study of State practice, including analysis of the circumstances under which States have recourse to the provisional application of treaties, was required before any determination of its legal effects.

70. Several delegations spoke in support of considering the effect of a unilateral commitment to provisionally apply all or part of a treaty. However, disagreement was expressed with the suggestion that the decision to provisionally apply a treaty could be characterized as a unilateral act, as the Vienna Convention specifically envisaged agreement between States. Several delegations spoke in favour of the understanding that the source of the obligation remained the treaty (being provisionally applied) itself and not the declaration of provisional application. Doubts were also expressed concerning the possibility that article 25 of the Vienna Convention could be interpreted as permitting a State to unilaterally declare the provisional application of a treaty if the treaty itself was silent on the matter. It was observed that since provisional application is deemed to establish treaty relations with the States parties, a unilateral provisional application would oblige the States parties to accept treaty relations with a State without their consent. As such, in terms of that view, a provisional application of a treaty by unilateral declaration without a special clause in the treaty could only take place if it could be established that the States parties agreed to such a procedure. That conclusion did not rule out the possibility that a State could commit itself to respecting the provisions of a treaty by means of a unilateral declaration without obtaining the agreement of the States parties. In so doing, the application resulting from a unilateral declaration could only lead to obligations incumbent upon the declaring State. In terms of another view, unilateral action could lead only to the application of an international treaty rule in domestic law.

71. As to the point in time from which the obligation arose, the view was expressed that the Special Rapporteur's assessment that the legal obligation for the State arose not when the treaty was concluded, but at the point in time at which the State unilaterally decided to resort to provisional application, applied only to

multilateral treaties. For bilateral treaties, the obligation would arise when the treaty was concluded.

72. Concerning the termination of provisional application, some delegations expressed disagreement with the assertion that a State that had decided to terminate the provisional application of a treaty would be required, as a matter of law, to explain the reasons for doing so to other States to which the treaty applied provisionally or to other negotiating or signatory States. Likewise, doubts were expressed regarding the view that provisional application could not be revoked arbitrarily.

### 3. Future work

73. Support was expressed by several delegations for the Special Rapporteur's intended consideration of the provisional application of treaties by international organizations. Special reference was made to relevant practice in the context of the European Union. It was suggested that the Commission take into account situations where the treaty was applied provisionally by an international organization as well as by its members States, since the scope of the provisional application would be different for those entities.

74. Several delegations expressed support for the preference of the Special Rapporteur not to embark on a comparative study of domestic provisions relating to the provisional application of treaties. According to that view, whether or not a State resorted to provisional application was essentially a constitutional and policy matter. Several other delegations called for a thorough analysis of State practice, which for some delegations also implied a comparative study of practice at both the international and domestic levels. It was observed, in support of that more inclusive approach, that it was possible to find in treaty practice provisions stating that the contracting States were to apply provisionally an international agreement only to the extent permitted by their respective national legislation. It was also noted that reliance on relevant State and judicial practice was crucial when examining the consequences arising from a breach of an obligation in a treaty being provisionally applied.

75. Suggestions for specific issues to be considered by the Commission included the extent to which provisions involving institutional elements, such as provisions establishing joint bodies, might be subject to provisional application; whether provisional application should also extend to provisions adopted by such joint bodies during provisional application; whether there existed limitations with regard to the duration of the provisional application; the relationship with other provisions of the Vienna Convention and other rules of international law, including on responsibility for breach of international obligations; the customary international law character of provisional application; whether or not provisional application could result in the modification of the content of the treaty; the modalities for and effects of termination of provisional application; the applicability of the regime on reservations to treaties; the effects of other treaty actions, such as modification of the treaty or ratification without entry into force, during provisional application; and the different consequences of the provisional application of bilateral and multilateral treaties. It was also suggested that the Commission consider the legal difference between a State's provisional application of a treaty that had not yet entered into force internationally but which the State had ratified according to its

domestic constitutional requirements, and a State's provisional application of a treaty that had entered into force internationally but which had not yet entered into force for the State. Support was also expressed for a study of the practice of treaty depositaries.

#### 4. Final form

76. Suggestions by delegations included developing model clauses on provisional application, a guide with commentaries and draft guidelines or conclusions.

## H. Most-favoured-nation clause

77. Noting that the work of the study group of the Commission on the topic was proceeding in the right direction, delegations looked forward to receiving the shortened and updated finalized report, expected to be submitted 2015. It was anticipated that the outcome could serve as a valuable practical guide for treaty negotiators, policymakers and practitioners involved in the investment area. In the light of the evolving diversity in the case law, some delegations expressed the hope that the work of the study group would contribute to the certainty and stability in the investment field.

78. Delegations underlined their endorsement of the approach of the study group, which attached relevance to the Vienna Convention on the Law of Treaties, as a point of departure for the interpretation of investment treaties. The point was made reiterating the importance of the principle of consent between parties negotiating agreements with regard to the scope and coverage of a most-favoured-nation clause, including the consent to exclude certain provisions from the clause. Given that a most-favoured-nation clause was treaty-specific and its interpretation was dependent on other provisions of the relevant treaty and therefore unlikely to lead to a uniform approach, the goal of the study group to analyse and contextualize case law on most-favoured-nation clauses in the investment area, review the prior work undertaken by the Commission and contemporary practice and identify trends and approaches in the interpretation of the clause was considered to be an appropriate one.

79. The point was made that it would be useful to further consider the most-favoured-nation clause in relation to trade in services and investment agreements; its relationship to the core investment disciplines; and the relationship between most-favoured-nation clauses, fair and equitable treatment and national treatment standards.

80. Some delegations also expressed their support for the orientation of the study group not to formulate new draft articles or revise the 1978 draft articles as an outcome of its work.

## I. Other decisions and conclusions of the Commission

#### Crimes against humanity

81. A number of delegations welcomed, and several others took note of, the inclusion of the topic "Crimes against humanity" in the Commission's programme of work. It was hoped that work on this topic would not only help to develop

international criminal law and fill gaps in the international legal framework, but also reflect and build upon the Commission's prior work. It was nevertheless also observed that while consideration of this topic could be valuable, it involved complex legal issues which needed to be addressed carefully in light of the views of States. There was need for caution, which would also require that the purpose of the Commission's work be clearly defined. Several delegations emphasized the topic's relationship with existing legal instruments, and in particular the Rome Statute of the International Criminal Court, noting that it was essential that work in that area not be affected. It was also observed that the relationship between this topic and the Rome Statute required further clarification. According to some delegations, the Rome Statute and implementing domestic legislation sufficiently filled any lacunae in this area and they doubted the need for further work.

82. Some delegations considered that the focus of work of the Commission should be on strengthened mutual legal cooperation, adequate domestic legislation and building capacity to prosecute crimes against humanity at the domestic level. In this connection, some delegations emphasized that the Commission should take into account the initiative by some States on a new treaty for mutual legal assistance and extradition for domestic prosecution of atrocity crimes.

83. The view was also expressed that the most important task consisted in defining the legal concept and scope of crimes against humanity. While some delegations considered that work on definition of such crimes should be avoided, several others stressed that the definition contained in article 7 of the Rome Statute should be retained as the material basis for the Commission's work. Moreover, it was suggested that the Commission address the effects and consequences of categorizing an act as a crime against humanity; explore and articulate relevant responsibilities pertaining to the prevention of the crime against humanity and consider mechanisms to ensure its effective prevention; and address both international and non-international armed conflicts.

84. It was also suggested that the Commission address procedural and jurisdictional aspects of the topic, which were directly linked to the principle of universal jurisdiction and the obligation to extradite or prosecute. In this regard, it was considered beneficial to analyse how an extradite-or-prosecute regime in respect of crimes against humanity might operate. Furthermore, the view was expressed that issues such as civil jurisdiction and immunity should not be dealt with under this topic. It was also suggested that the Commission adopt a victim-oriented approach in its work. The Commission was also encouraged to draw from the jurisprudence of the various international criminal courts and tribunals.

***Jus cogens***

85. Several delegations welcomed, and some others noted, the inclusion of the topic "*Jus cogens*" in the Commission's long-term programme of work, further observing that the concept would benefit from further clarification and deserved careful analysis. The Commission was, however, urged to approach the topic with prudence in light of the complex issues involved and to provide a more precise delimitation of the topic. Doubts were also raised as to the usefulness and timeliness of undertaking work in this area. It was suggested that the existing disagreement among States about the theoretical underpinnings of *jus cogens* made the possibility of reaching consensus on the topic unlikely. In addition, the topic's close

relationship with other topics on the Commission's agenda risked confusion, inconsistency and inefficiency. The Commission was encouraged to address the concerns expressed previously when it concluded that it was premature to enter into this kind of study. It was also suggested that the Commission might wish to limit itself to conducting a descriptive analytical study on the understanding of *jus cogens* in contemporary practice without the intention of codifying or progressively developing the law.

86. Some delegations considered the legal issues that had been identified in the syllabus to the topic (A/69/10, annex, para. 13) an appropriate framework from which to proceed. In that regard, the view was expressed that the greatest contribution that the Commission would offer would be the identification of the requirements for a norm to reach the status of *jus cogens*, and the effects of such a norm on international obligations. The Commission was further encouraged by some delegations to address the relationship between *jus cogens* and customary international law, as well as obligations *erga omnes*, international rules outside the realm of treaties and subsequent norms of a similar character. While some delegations considered that the Commission should establish an illustrative list of norms that had achieved the status of *jus cogens*, a number of other delegations cautioned against it. Even a merely illustrative list would entail a risk that other equally important rules of international law would be given inferior status and hamper a dynamic evolution in this area of law. The Commission's attention was drawn by a number of delegations to the relevance of the jurisprudence of national and international tribunals to the development of the topic, and in particular of the International Court of Justice.

**Future work of the Commission**

87. The decision to request the Secretariat to review the 1996 illustrative general scheme of topics and prepare a list of potential topics for the Commission's consideration (A/69/10, paras. 271 and 272) was commended by a number of delegations. A suggestion was also made that the Commission consider a topic on the duty of non-recognition as lawful of situations created by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

**Programme and working methods of the Commission**

88. Some delegations expressed a preference for having fewer topics on the Commission's agenda to allow for speedier and more in-depth consideration. Similarly, it was observed that the list of specific issues on which comments were requested from States by the Commission was excessively long, making it difficult for most States to comply within the time limits. Concerns were also voiced that only a minority of States provided comments to the Commission, which was due to disparities of resources among States rather than a lack of interest. A number of delegations also emphasized the importance of enhanced engagement between the Commission and its special rapporteurs and the Sixth Committee. In that regard, several delegations observed that it might be beneficial for the Commission to hold some of its sessions in New York, with some recognizing the resource constraints of such a move. However, a strong reservation against such a move was also voiced. Regrets were expressed that, owing to budgetary constraints, it was not possible for all special rapporteurs to attend the discussions in the Sixth Committee, which affected the effectiveness of the debates.

89. Several delegations emphasized the importance of the legal publications of the Codification Division of the Office of Legal Affairs, noting in particular that those publications should not be jeopardized owing to financial reasons. They also acknowledged the substantive support of the Division to the Commission. The relevance of the International Law Seminar was also highlighted by a number of delegations.

# III. Items on which the Commission completed work at its sixty-sixth session

## A. Expulsion of aliens

### 1. General comments

90. Several delegations expressed appreciation for the balance attained in the draft articles on the expulsion of aliens, adopted by the Commission on second reading, between States' sovereignty and the rights of aliens subject to expulsion. Other delegations considered, however, that such balance was not maintained in the draft articles.

91. A number of delegations commended the Commission for greatly improving the draft articles in the light of comments made by Governments on the draft articles adopted on first reading, while other delegations regretted that some of the suggestions made had not been reflected in the second reading text. In particular, it was noted that some comments made with a view to ensuring the protection of the human rights of the aliens subject to expulsion had not been incorporated in the draft articles. It was also suggested that the draft articles overemphasized individual rights. The opportuneness of regulating a field where detailed global and regional legal regimes already existed was also questioned.

92. Some delegations noted that, while certain principles contained in the draft articles were well established, some provisions did not enjoy widespread adherence and could not be considered as a reflection of customary international law. Several delegations indicated that progressive development in that area should be approached with caution. In addition, the view was expressed that no strict distinction between codification and progressive development of international law could be made.

### 2. Specific comments on the draft articles adopted on second reading

93. With respect to Part One, General provisions, certain delegations welcomed the delimitation of the scope of the draft articles and the definition of "expulsion", while other delegations regretted that the Commission did not distinguish more clearly between the rights recognized for different categories of aliens.

94. Some delegations supported draft article 3, Right of expulsion, although it was suggested that specific mention should have been made to respect for domestic law and public security. Support was also expressed for the formulation of draft article 4, Requirement for conformity with law, and draft article 5, Grounds of expulsion.

95. Regarding Part Two, Cases of prohibited expulsions, a number of delegations stressed that the draft articles, and in particular article 6, Rules relating to the expulsion of refugees, should not undermine international refugee law, including the prohibition of refoulement, as well as the obligation of States to readmit their own nationals. Regarding draft article 7, Rules relating to the expulsion of stateless persons, the importance of not prejudicing the legal regime for stateless persons was also emphasized. According to one view, draft article 8, Deprivation of nationality for the sole purpose of expulsion, should be understood as not affecting the State's right to deprive an individual of his nationality on a ground provided for in its legislation. It was also suggested that this provision should have expressly prohibited the expulsion of nationals. Some delegations supported the prohibition of collective expulsion set out in draft article 9, Prohibition of collective expulsion. Draft article 10, Prohibition of disguised expulsion, was also supported, while some delegations considered that it was too broadly drafted and would potentially restrict legitimate alternative approaches to enforcement. A view was expressed that draft article 11, Prohibition of expulsion for purposes of confiscation of assets, should explicitly state that the draft article did not extend to situations in which assets were confiscated as a sanction consistent with law for the commission of an offence. It was also suggested that this draft article was too detailed. Support was expressed for draft article 12, Prohibition of resort to expulsion in order to circumvent an ongoing procedure, although, according to one view, its formulation could have been clarified.

96. Regarding Part Three, Protection of the rights of aliens subject to expulsion, several delegations stressed that draft article 14, Prohibition of discrimination, should have expressly mentioned discrimination on grounds of sexual orientation. It was suggested that the approach taken by the draft article would prevent States from responding legitimately to specific threats to the integrity of domestic borders and immigration systems. The view was expressed that draft article 15, Vulnerable persons, was imprecise. Support was expressed for draft article 18, Obligation to respect the right to family life, although it was suggested that its text could have been developed in a detailed way.

97. Some delegations considered that the formulation of article 19, Detention of an alien for the purpose of expulsion, which provided for the separate detention of aliens subject to expulsion from prisoners serving criminal sentences, would hamper a State's management and control of illegal migrants. Some other delegations, however, regretted that the draft article did not sufficiently take into account regional instruments of protection of human rights with respect to the right to liberty and conditions of detention. Concern was also expressed about the requirement that the extension of the duration of detention may be decided only by a court or, subject to judicial review, by another competent authority. The formulation of draft article 21, Departure to the State of destination, was supported, although a view was expressed that it should have specifically reaffirmed the right of States to use coercive measures in cases of forcible implementation. Draft article 22, State of destination of aliens subject to expulsion, was welcomed by some delegations, although the view was expressed that it was too broadly drafted, given that a State was required to admit on its territory its nationals only. The formulation of draft article 23, Obligation not to expel an alien to a State where his or her life would be threatened, was welcomed. A number of delegations, however, expressed reservations on its formulation, noting the absence of consensus on the abolition of

the death penalty. Some delegations considered that the formulation of draft article 24, Obligation not to expel an alien to a State where he or she may be subject to torture or to cruel, inhuman or degrading treatment or punishment, went beyond current international law.

98. As regards Part Four, Specific procedural rules, draft article 26, Procedural rights of aliens subject to expulsion, was supported by some delegations. According to another view, the draft article extended the same procedural guarantees to both aliens present lawfully and unlawfully in the territory of the State despite the fact that the international instruments cited as sources in the commentary addressed solely the right to a review for aliens lawfully present in the territory of the State. Some delegations considered the reference to "a brief duration" in its paragraph 4 to be unclear.

99. Several delegations welcomed the reformulation of draft article 27, Suspensive effect of an appeal against an expulsion decision, limiting the suspensive effect of appeals to situations where there is a real risk of a serious irreversible harm, while, according to another view, the draft article unduly restricted State sovereignty. Some delegations considered that draft article 28, International procedures for individual recourse, was not sufficiently clear.

100. With respect to Part Five, Legal consequences of expulsion, some delegations expressed concern regarding draft article 29, Readmission to the expelling State, indicating that there was no individual right to readmission. The view was expressed that draft articles 30, Responsibility of States in cases of unlawful expulsion, and 31, Diplomatic protection, were not necessary and could have been omitted.

### 3. Comments on the recommendation of the Commission

101. Some delegations endorsed the Commission's recommendation proposing that the General Assembly take note of the draft articles, while others indicated a preference for not doing so. Several delegations stressed that the draft articles should serve as the basis of a convention on the expulsion of aliens. A number of delegations, however, expressed the view that the elaboration of a convention on the basis of the draft articles was not appropriate at the current stage. It was suggested that the draft articles be left in their current form in order for the practice of States to develop and consolidate. A number of delegations considered that the draft articles should not be incorporated into a convention, but rather adopted as guidelines and guiding principles.

## B. Obligation to extradite or prosecute (*aut dedere aut judicare*)

102. Delegations welcomed the adoption by the Commission of its final report on this topic, emphasizing further that the obligation to extradite or prosecute constituted a key tool in the fight against impunity. The fact that observations made by States during the previous debates in the Sixth Committee had been taken into account in the preparation of the final report was particularly welcomed.

103. Several delegations observed that the report, together with the Survey by the Secretariat of multilateral conventions which may be of relevance for the Commission's work on the topic (A/CN.4/630), constituted useful and practical guidance for States in implementing the obligation. The report was seen as an

appropriate conclusion of the work on this topic. Some delegations nevertheless regretted that the work had not yielded more detailed results on the fulfilment or application of the obligation to extradite or prosecute. In that regard, it was suggested that the Commission consider preparing recommendations concerning its implementation. Doubts concerning the topic and the issues that needed to be considered in relation to it were nevertheless also reiterated; it was noted that enormous uncertainties remained with regard to key aspects of the matter.

104. Several delegations reiterated their view that the obligation to extradite or prosecute only resulted from specific treaty provisions and not from customary international law. Noting also that the obligation varied considerably in its formulation, content and scope in the conventional framework, they observed that it would be futile to attempt to harmonize these diverse treaty arrangements. Taking into account the different types of treaty provisions containing the obligation, it was pointed out that when drafting treaties, States were well placed to decide which formula of the obligation best suited their objective in the particular circumstance. However, the view was also expressed that the obligation might find its basis in customary international law if that was the source for the crimes in question.

105. It was noted that the Commission's work had elucidated two important considerations concerning the application of the obligation to extradite or prosecute, namely the gap between the existence of the obligation and its implementation and the need to ensure its wider application. In that connection, the Commission's attempt to identify lacunae in the present conventional regime on the obligation with respect of crimes of international concern was welcomed by several delegations. The Commission was encouraged to give consideration to a broader application of the obligation while considering related topics, in particular "Crimes against humanity". The view was also expressed that the obligation must be applied in accordance with the principles of the Charter of the United Nations, as well as considered in light not only of State practice but of the relationship between international law and domestic law. It was also stressed that the existence of international criminal tribunals needed to be taken into account when considering the obligation to extradite or prosecute.

106. References were also made to the analysis in the report of the judgment of the International Court of Justice in the case concerning *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal)*,[2] which helped to elucidate the topic further. However, some delegations doubted that any far-reaching conclusions could be drawn from the findings in that judgment.

107. Concerning the question of the relationship of the obligation to extradite or prosecute with other principles, some delegations reiterated their view that the obligation and the principle of universal jurisdiction were distinct concepts. However, it was also pointed out that any meaningful consideration of the topic would have to be centred on the principle of universal jurisdiction.

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[2] *I.C.J. Reports 2012*, p. 422.